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Official Report

JUSTICE COMMITTEE

Tuesday 14 September 2010

Session 3

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CONTENTS

JUSTICE COMMITTEE
24th Meeting 2010, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*James Kelly (Glasgow Rutherglen) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)
*Dave Thompson (Highlands and Islands) (SNP)

COMMITTEE SUBSTITUTES

John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Dr Richard Simpson (Mid Scotland and Fife) (Lab)
Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Lord Drummond Young (Scottish Law Commission)
Laura Dunlop QC (Scottish Law Commission)
Robert Milligan QC (Faculty of Advocates)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 14 September 2010

[The Convener *opened the meeting at 10:17*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I ask everyone to switch off mobile phones. We have received no apologies.

Under agenda item 1, I ask members whether they agree to take items 3 and 4 in private today, and to consider the committee's work programme in private at next week's meeting. Do members agree to take those items in private?

Members *indicated agreement.*

Damages (Scotland) Bill: Stage 1

10:18

The Convener: Agenda item 2 is the second day of oral evidence on the Damages (Scotland) Bill, which has been introduced by Bill Butler. Although Mr Butler is a member of the Justice Committee, he is not able to participate in that capacity in the committee's consideration of the bill. However, he is permitted to participate in public items on the bill, including asking questions of witnesses.

I welcome the first panel of witnesses, which comprises Lord Drummond Young, who is chairman of the Scottish Law Commission, and Laura Dunlop QC, who is a commissioner. I invite Lord Drummond Young to make a short opening statement to explain the background to the commission's report and the general shape of its recommendations. He might wish—this is a matter for himself—to refer to the evidence that we have received from his colleagues in the Court of Session about the percentages, which is at some variance with the commission's report. After we have heard the opening statement, we will proceed to questioning.

Lord Drummond Young (Scottish Law Commission): At the outset, let me say that the Scottish Law Commission is always very pleased to give evidence on bills that originate in Law Commission reports, to explain our thinking and to answer any questions that members may have. Professor Joe Thomson, who was the lead commissioner on the project, has retired—hence my presence here—but Laura Dunlop was a member of the advisory group. She can contribute from a practitioner's perspective, which is something that I can no longer do. We are also accompanied by Susan Sutherland, who was the project manager for the project, and by Susan Robb.

An important feature of our draft bill is the consolidation of the legislation on damages for wrongful death. At present, that legislation is in—to put it fairly mildly—a chaotic state. A single act will be much better. It will be more coherent and much easier to use. The commission's "Report on Damages for Wrongful Death" was produced two years ago and resulted from a Government reference. The bill that we produced with that report followed a significant consultation process. I think that it is correct to say that the report provides the first ever comprehensive review of Scots law in the area of wrongful death. Until now, the law has developed piecemeal, with an act here and an act there.

The "Discussion Paper on Damages for Wrongful Death", which we published before our report, canvassed a number of possibilities, including one very radical solution that would have let the executor—rather than the deceased's relatives—sue for the whole amount that the deceased would have earned during the remainder of his working life, less the amounts that he would have spent on himself. The compensation would then have been distributed as part of the deceased's estate. In fact, that is not a particularly novel system—it is used in a number of American states—but respondents to the consultation generally indicated that they were happy with the present system, subject to certain criticisms. In practice, the present system gives the main right to sue to the deceased's family. Although there are some cases in which the executor will have a right to sue on behalf of the deceased's estate, in a normal case it will generally speaking be the family—typically, the wife and children, but nowadays relationships other than a wife may be involved—who sue.

In preparing our report, the commission looked further at how the existing law could be improved. We did that in consultation with an expert advisory group consisting mainly of legal practitioners with great experience in this area. We came up with the proposals in our report, which was published exactly two years ago in September 2008.

We propose three main changes in the law. The first problem, which is probably the most significant, relates to the calculation of loss of support from the deceased to his family. In practice, we understand that the sum is usually agreed between the parties in any given litigation, but considerable work is required by the pursuer's solicitors to work out the amount. The particular problem relates to the amount that the deceased would have spent on himself, as against the amount that he would have spent on his family and what might be called household expenses. Determining the amount that the deceased would have spent on himself, as against those other matters, is a very difficult exercise. Usually, that involves the solicitor going through household bills and accounts with the surviving spouse or other dependents. That is quite a time-consuming exercise—the Law Society suggests that the cost is typically of the order of £1,000 or £2,000 in legal fees—but, perhaps more important, it is, understandably, very upsetting for the deceased's relatives to have to go through the minute details of the household accounts in that way. On top of that, the exercise does not really yield a figure to which one can attach much confidence. It is extremely hard to reach any definite view on the amount that the deceased would have spent on himself. I am sure that most of us would find exactly that if we tried to analyse our own household expenditure in that way.

In practice, settlement negotiations start on the basis that the deceased spent 25 per cent on himself and the rest on what may loosely be called the family, but that 75 per cent really breaks down into three distinct parts: first, the other spouse or cohabitant or civil partner; secondly, the children; and, thirdly, what might be called general household expenses that are not attributable to any one individual—an important area, to which I will return. The flaw in the reaction of the judges of the Court of Session is that they tend to treat all of the 75 per cent as expenditure on the other spouse. In the example of a deceased who leaves only a spouse, they criticise our approach by saying that we assume that 25 per cent should go to the deceased and 75 per cent to the spouse, but we actually suggest that most of that 75 per cent would go on general household expenses.

We accept that the figure of 25 per cent expenditure on the deceased's own expenses is to some extent arbitrary, but the law of damages is inevitably arbitrary to some extent. For example, some perfectly real losses are excluded in a damages calculation. A great deal of the child care expenditure that can result from the death of one of the parents is excluded. Inevitably, one parent will find it much more difficult to look after children than two parents would, and the surviving parent might need to cut back on working or to employ professional child minders. By and large, that sort of expenditure is excluded from the calculations, but real losses are involved. Another example is that a loss to the family business through the death of one of the partners in that business is not compensated for.

In calculating the expenditure that the deceased would have spent on himself or herself—as I have tried to emphasise, the calculation is very inexact—we cannot be confident that the correct figure will be reached in any case, so we thought that a degree of arbitrariness seemed a worthwhile price for getting rid of the need for an intrusive and upsetting investigation of household expenditure. There should also be some saving in legal expenses from our proposal that the deceased's expenditure on himself or herself should be taken as 25 per cent of his or her earnings.

The second area that we considered was the decision in the Brown v Ferguson case, which was reported in 1990. In that ruling, it was decided that in the normal case, which in practice means nearly all cases, the net income of the deceased and his spouse or cohabitant or civil partner should be added together, a deduction—of 25 per cent or whatever—should be made for the deceased's living expenses and the pursuer's income should then be deducted, which then leaves a sum for

loss of dependency that can be multiplied by an actuarial figure to represent the number of working years that the deceased would have had, although that is discounted for a number of factors.

In what might be called an old-fashioned family, in which the wife does not work or earns little, the Brown v Ferguson ruling produces a perfectly fair and reasonable result, but it is now much more common to find that both spouses work and—this is an important point—that they base their household expenditure on their total income. That is especially true of general household expenditure, of which the house is probably the most significant item and is of much greater significance than it used to be. One very important social change of the past 30 or 40 years has been the much greater incidence of home ownership.

10:30

Normally, the most important part of household expenditure will be on the house, including paying off the loan, repairs and maintenance, council tax, insurance, essential services such as electricity and gas, the television licence and so on. All that takes a very large chunk of household expenditure. In a case in which, say, a husband who is killed leaves a wife and children, it seemed to us to be quite unreasonable to expect the family to move to a smaller or less expensive house following the father's death. It is quite reasonable that they should remain in their current house, but their expenditure on that house will probably be based on the joint incomes of both spouses. That is the point that we want to recognise. I feel that the judges' response fails to take into account the full significance of that general household expenditure, which for most people will be the largest single item of expenditure.

Other general household expenditure includes a car—which most families now have—and savings, which really fall into the same category because savings are simply money that is set aside for use by the household or, in due course the children, in the future. The central point is that all such expenditure is likely to be based on the joint income of the two spouses. It seems to us that the law fails to reflect economic reality in a very large number of cases. In effect, to maintain the household at the existing level the survivor needs his or her own income as well as the deceased's income, which is what is represented in the award of damages.

The third area in which we recommend some change is the date from which future loss of support is calculated. At present, the loss of the deceased's support tends to be calculated from the date of death to the date on which he would normally, on an actuarial basis, have ceased work or died. A deduction is then made for the period prior to proof. However, that is not correct actuarially. The correct method is to treat the loss to the date of proof as past loss and to calculate the future losses from the date of proof. That method is recognised in the Ogden tables, which are the standard actuarial method of calculating damages, and is the approach that would generally be supported by an actuary. The result of our proposed change is that the discount for futurity—the discount for uncertainty in the future, one might say—will apply only to the future loss, not to past loss, where it is not appropriate to apply such a discount, given that we know what has happened in the past. Our proposal would bring the law into line with the preferred approach under the Ogden tables.

The fourth change that we suggest is that the relatives who can sue for loss of support should be restricted. That would bring the law on loss of support into line with the law on who can sue for loss of society or—as some might put it—grief and companionship. The proposed change would involve a reduction in the numbers available. We thought that the existing law was too wide in modern circumstances. In so far as former spouses in particular are concerned, one of the policies in recent years has been to bring about a clean break on divorce.

One final point that I want to deal with, regarding our central proposal that it should be conclusively presumed that the deceased would have spent 25 per cent of his income on himself, is the suggestion that that should be a rebuttable presumption rather than a rule of law. In other words, it is suggested, evidence could be led to suggest that a particular case was different because the deceased would have spent more, or possibly less, on himself.

The problem with that is that it would still be necessary to perform the upsetting and difficult exercise of going through the household accounts—the family expenditure—with the surviving spouse or another member of the family. In one sense, things would be worse than they are at present. Currently, the exercise is done at the outset of proceedings through sitting down with the family's solicitor. If there is a rebuttable presumption, in many cases the exercise would be performed at a later stage rather than at that stage, under pressure of demands for information from the defender—from the insurance company, in effect. It seems to me that that would be likely to be more upsetting than even the present system. In other words, a rebuttable presumption of that nature would not be a particularly good solution.

That is all that I want to say by way of introduction. Obviously, we are happy to deal with any questions that members may have. I do not

know whether Laura Dunlop would like to add anything to what I have said.

The Convener: No. We must move to questions now. Lord Drummond Young has anticipated to a significant extent the issues that the committee seeks to pursue with him. Members will no doubt bear in mind the comments in his opening statement when they pose questions.

I will open the questioning. The Scottish Law Commission has, of course, done a great deal of work on the matter in question and certain related matters. It has published three reports: "Report on Damages for Wrongful Death", "Report on Damages for Psychiatric Injury" and "Report on Personal Injury Actions: Limitation and Prescribed Claims". Would you have preferred those three reports to have been rolled up and dealt with in one comprehensive bill, or are you quite content to see the recommendations in "Report on Damages for Wrongful Death" implemented in the Damages (Scotland) Bill?

Lord Drummond Young: I am quite content for a bill related to "Report on Damages for Wrongful Death" to be dealt with separately. We suggested that the three reports could be rolled up together, but that was really to facilitate the passage of our recommendations through Parliament. That is what matters. From the user's point of view, it is probably better to have separate bills, as we are talking about discrete areas of law.

The Convener: The fixed 25 per cent rule relating to the deceased's living expenses is possibly of limited controversy here. You have dealt with a number of points that relate to it, but I ask Dave Thompson to pursue the matter. It should be borne in mind that some information has already been provided.

Dave Thompson (Highlands and Islands) (SNP): I welcome both witnesses to the meeting and thank Lord Drummond Young very much for his introductory remarks. He has covered a number of points relating to the 25 per cent rule. Why was that rule not consulted on in the original commission discussion paper?

Lord Drummond Young: Some rather radical and fundamental issues were considered in our discussion paper, including a possible total recasting of the law. It became clear that there was general satisfaction with the law as it stands, but one issue stood out in our consultation exercise as a running sore, if I may put things in that way: determining the amount that the deceased spent on himself or herself. That is an important part of the calculation of loss of support. The problem went along with the Brown v Ferguson decision. It emerged from our consultation that the two seemed to be the main running sore in the area. The solution that we put forward came up in further discussions with the advisory group. I emphasise that Laura Dunlop was a member of that group, so she may be able to help with what happened.

Laura Dunlop QC (Scottish Law Commission): I certainly recall discussing the matter. I now wear a slightly different hat, as I am now a part-time commissioner at the Scottish Law Commission and am less in practice than I used to be. However, my recollection from practice is that the issue is difficult. I am in favour both of the principle of having a fixed rule rather than a presumption and of taking a figure of 25 per cent. That seems to me to be sensible.

Dave Thompson: In his presentation, Lord Drummond Young mentioned that it would potentially cost around £1,000 to £2,000 for the solicitor to sit down and work out the income attributable to the deceased.

Lord Drummond Young: I got the figure from the Law Society of Scotland. I have no reason to doubt it.

Dave Thompson: It is very helpful to know roughly the costs. The Medical Defence Union and the Forum of Insurance Lawyers dispute that there is any barrier to resolution of the claim. You mentioned the potential financial savings from accepting 25 per cent. What time savings can we expect if we go for a fixed amount instead of discussions, negotiation and so on?

Lord Drummond Young: If I recall rightly, the Law Society suggestion was for about four or five hours of solicitor time; family time is on top of that. Household accounts have to be looked out and thought about. That involves quite a bit of family time.

Dave Thompson: What about the time taken in setting up the process? Surely it will take a week or two to get everything in place. The delay to the process could be more than just the hours that you have cited.

Lord Drummond Young: The solicitor will write to the family and perhaps have an initial consultation with family members at which he or she would say, "We need this information. You will have to look it out." The family will then be given a period in which to do that. It will take a bit of work on the family's part. The evidence from the people who perform this exercise—the solicitors who act for pursuers—is that the business of going through the details of expenditure is always upsetting for families. After all, they have been quite recently bereaved.

Dave Thompson: We have heard that having a fixed 25 per cent would benefit the wealthy and be to the detriment of the poorer people. What is your comment on that?

Lord Drummond Young: A fixed 25 per cent would not do that, but getting rid of the Brown v Ferguson rule on the way in which a spouse's income is treated would probably have the effect of benefiting wealthy people more than poorer people. That is simply because the claims of wealthy families are greater than those of poorer families. There is nothing you can do about that. We have explored the matter in the tables and calculations at the back of our report. If anything, the 25 per cent figure tends to favour poorer families. It is typically the case that a poorer family spends a greater proportion of its money on basic items such as food, clothing and transport to work, which are the three main items of the deceased's personal expenditure. As I said, expenditure on the house will typically be lower.

The Convener: We turn to questions on section 14 of the bill, which is on those who are entitled to a remedy being extended beyond the immediate family. Lord Drummond Young dealt with the subject in primary evidence. Stewart Maxwell will lead our questioning. In so doing, he will bear in mind that some of our questions have already been answered.

Stewart Maxwell (West of Scotland) (SNP): Good morning, Lord Drummond Young. I heard what you said on the commission's recommendation to restrict the categories of relative who can claim for loss of the victim's financial support. It is clear that the Law Society takes a different view from that of the commission on the matter. The Law Society's view is that whether or not someone is a relative, if they have a connection to the deceased and they can demonstrate a loss of financial support, they should be entitled to sue for such a loss. Will you expand on the commission's recommendation, given the opposing view of the Law Society?

Lord Drummond Young: Clearly, there have to be limitations on the ability to recover damages. There are many limitations in the existing law. Our feeling is that loss of society and loss of support should be brought into line to provide coherence in those two parts of the wrongful death claim. That is our main argument. This is not central to our recommendations. We simply feel that there is a case for coherence in this area of the law. The number of cases where someone other than the immediate family has a claim for support are pretty few and far between.

Stewart Maxwell: I accept that it would be a relatively rare event for somebody outside the immediate family to have a claim, but one can imagine circumstances in which an individual supports a nephew, niece, cousin or some other member of the wider family. I understand your point about coherence of the law and bringing the two parts into line but, to my mind, it seems unfair and illogical to exclude people who were supported by the individual and who can clearly demonstrate a financial loss because of the wrongful death. The fact that the situation would be rare is neither here nor there in the argument—it is simply unjust to exclude such people. Will you expand on that issue a little?

10:45

Lord Drummond Young: Our conclusions are set out in the report. Paragraph 3.57, which is the very last paragraph in the report, states:

> "In these circumstances we have taken the view that title to sue for patrimonial loss should be restricted to those relatives who currently constitute the deceased's immediate family. In the context of contemporary family structures in Scotland, they are the relatives who are most likely to have had an affective relationship with the deceased and who are most likely to have been in receipt of the victim's support at the time of his death. In short the current group of relatives with title to sue for patrimonial loss is too wide and has become anachronistic."

We thought that

"the provisions in the 1976 Act are complicated and ambiguous."

The intention is to bring about a simplification of the law, but it is obviously open to the committee and the Parliament in due course to take a contrary view.

Stewart Maxwell: That paragraph suggests that part of the reason for the suggested change is the modern family structure. Is that what you were suggesting?

Lord Drummond Young: In part, that is right. That the nuclear family has come to replace the extended family is really what it comes down to.

Stewart Maxwell: That is what I took from what you said, but have you thought about families who do not match that model in what is a diverse Scotland? We have a sort of westernised culture with much more nuclear families, but extended families are fairly common in other cultures.

Lord Drummond Young: It is certainly true, for example, that families who came originally from the Indian subcontinent often have a rather different family structure. We did not consider that aspect, as far as I can recall.

Stewart Maxwell: Okay.

My final question is about the danger of including business rather than domestic relationships. That was one reason that the commission gave for restricting the current class of relatives.

Lord Drummond Young: Yes, that is right.

Stewart Maxwell: In oral evidence last week, the Law Society stated that that is not really a

problem and that it can easily be overcome by careful drafting. Do you have a comment on that?

Lord Drummond Young: It should be possible to exclude business relationships through proper drafting. It is important to do that, because that is a totally different sort of claim—it is not a claim for the family. Generally, the law has excluded those relationships on the basis that there must be a limit to liability and damages or the compensation culture would run right out of hand. I imagine that, with proper drafting, it should be possible to exclude them.

Stewart Maxwell: So you accept the Law Society's point.

Lord Drummond Young: That point is correct, as far as it goes.

Robert Brown (Glasgow) (LD): I will ask a couple of questions about the categories of people who can sue. The first is on former spouses and the clean-break policy on divorce. I would like clarification for the committee's benefit on the circumstances in which the clean-break policy would not apply. At present, some former spouses would have claims of some sort on a deceased former husband's estate.

Lord Drummond Young: I think that, under the present law, in cases in which the deceased had continued to support a former spouse for whatever reason—they can do a deal to that effect—the former spouse would have a claim, on death. The policy of the reforms in family law is that, on divorce, there should be a clean break, so sums of money are paid over and that is the end of it. Continuing obligations of support for former spouses are no longer the policy of the law. Our suggestion was an attempt to follow that through.

Robert Brown: Are there not exceptions to that in current divorce law?

Lord Drummond Young: There are cases in which a certain amount might be paid under a court decree to the surviving spouse but, generally speaking, the policy is to discourage that and to get everything tied up at the time of divorce.

Robert Brown: Presumably, any sums due under a court decree would continue as some sort of debt on the estate, would they?

Lord Drummond Young: Yes, they would.

Robert Brown: So one would need to make an order on that position.

Lord Drummond Young: Yes.

Robert Brown: So it is more the informal arrangements that can be the problem.

Lord Drummond Young: Yes.

Robert Brown: I have a couple of other issues to raise. One relates to the question of other people in the family, for example a foster child. We now have the concept of permanence orders. I am not entirely certain whether foster children—both those who are there for a relatively short time and those who are there for quite a long time—would be regarded as children accepted into a family according to some sort of order under the adoption and fostering arrangements. Perhaps it has not gone as far as that. What are your thoughts on that matter?

Lord Drummond Young: The foster child will usually be maintained by the foster parents. If the fostering arrangement continues with the surviving spouse, say, what is paid to support the foster child will be taken into account as part of what she gets. In a way, it is like the category of household expenditure. I do not like to describe a foster child in that way, but it is the same sort of idea, and it comes under the common expenditure of the two spouses and should be taken into account in the damages that are payable.

Robert Brown: That does not sound a terribly adequate definition when it comes to the rights of the child, the provisions of the Children (Scotland) Act 1995 and so on. Do you feel that circumstances of that sort, which can be quite varied, are all covered by the situation of the child who is accepted into the family?

Lord Drummond Young: There probably are some cases that would not be covered by the situation of the child who is accepted into the family. However, that is the criterion that has generally been used for the obligations of support right across the law. That is what we are trying to follow through.

Robert Brown: I was slightly surprised to hear that you had not considered the situation of ethnic minority groups in Scotland.

Lord Drummond Young: At a commission level, we did not, but I am not sure what the advisory group and the team working on the project did.

Robert Brown: There are now a substantial number of people in Scotland who will be affected by different family arrangements, such as mothers-in-law. Should that not have been taken into account?

Lord Drummond Young: I can see that the answer is probably yes, with hindsight. However, in such situations, the wider family will generally be catered for, in practice, through the surviving spouse. The members of the family will have informal support arrangements among themselves. The damages that are recovered by the surviving spouse will be there for the family, in a sense.

I have already suggested that, even in a western nuclear family, items such as the house and the family car are regarded as common to the family. In extended families, the property is regarded as common in the same sort of way, at an informal level. That is catered for, and the law does not particularly need to deal with that. That particular problem will not in fact be a problem in most cases. I suppose that a problem could arise in a situation where there is no surviving spouse or children and some more remote relatives might be looked after in an extended family structure. That is where there could be a problem, but that will be a pretty unusual situation, I suspect.

The Convener: We will now deal with the question of the 75 per cent figure that is to be used as the basis for settlements, referring also to the Brown v Ferguson case. Cathie Craigie will deal with this subject.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): If the convener will allow me, I wish first to ask a question concerning the last point. Good morning, Lord Drummond Young, and thank you for your contribution so far. Section 14(1) sets out the various relationships and defines "relative". Having listened to some of the evidence that the committee has heard so far, and perhaps having read some of the written evidence that we have received, do you think that there is room for improvement in that area of the bill?

Lord Drummond Young: There is a perfectly valid contrary argument. It is your function as parliamentarians to decide between the competing arguments. I have tried to explain why we have proposed what we have, but I accept that there is a perfectly valid contrary argument. It is up to the committee and, in due course, the Parliament to decide between them.

Cathie Craigie: Are you confident that what is before us in the bill will address the issues that regularly face the legal profession and lawyers in such cases?

Lord Drummond Young: Problems will probably arise in cases where, for example, a nephew was looked after by the deceased. That is a general point that applies both in a nuclear family and in an extended family. Those are the hard cases. The question is whether the simplicity for which we aimed in the bill is a good idea or whether something wider should be allowed. The problem is that the provisions that determine which relatives can sue under the present system are slightly chaotic. There is no difficulty in defining the categories of relative in wider terms, as long as they are clearly defined. If there is a policy decision to that effect, it will be important to exclude business losses. We have assumed that such a policy decision will be made, because making business losses recoverable would be a major extension of the law of damages.

Cathie Craigie: The commission recommended that the income of persons making the claim should be completely disregarded, although that proposal was not part of the consultation on the original discussion paper. How did your thinking on that important issue develop?

Lord Drummond Young: There are two central issues. The first is the logical point that the income of the surviving spouse is the surviving spouse's income. There is no reason why that in itself should affect the claim.

The second and more central point is that a great part of a typical family's expenditure today is general household expenditure. I mentioned the house as the big one; expenditure in that area has really grown in the past 30 or 40 years. Expenditure on the car, electricity, gas, the television licence and savings falls into the same category.

The Brown v Ferguson formula was unfair to couples who had determined their general household expenditure on the basis of both spouses' income—cases in which both incomes were required to service properly the loan on the house that a couple had bought, because of the house's size and location. That is a typical situation now. Applying the Brown v Ferguson formula hit such couples unfairly. It worked well enough in cases where one spouse—usually the wife—did not work or worked for pin money, but not in cases where both worked. It is now common for both spouses to work and to earn substantial amounts of money. Sometimes the wife earns more, but the husband does a more dangerous job and is killed. The Brown v Ferguson formula is particularly unfair in such cases.

The judges have suggested that the formula is only a presumption and that there can be exceptional cases, but in practice it tends to be regarded as a set formula. In a case about four years ago, Lord Glennie felt that he would have great difficulty in departing from the formula, which was producing unfairness in a case that is typical to an extent to which most of the others that we have discussed are not.

Cathie Craigie: You do not agree with the judges of the Court of Session when they say that section 7 would remove the flexibility that exists.

Lord Drummond Young: I do not think that such flexibility is exercised in practice. I am afraid that it is not a real argument.

11:00

The Convener: I have a question about issues that might arise from the use of the multiplier.

Some of the critics of section 7 have defended using a multiplier from the date of death on the ground that it would correctly discount for the possibility that the deceased might have died anyway other than from their injuries as a result of an accident. Consequently, it could be argued that the provision is, as it was eloquently put,

"based ... on a false premise."

What is your view on that?

Lord Drummond Young: As we are carrying out an actuarial exercise and using the Ogden tables, which have actuarial input, the actuarial view is that future loss should be treated as future loss and past loss as past loss. Future and past are determined as at the date of the proof. For example, if someone is injured rather than killed, you calculate the past loss separately from the future loss. We are saying that that should also be done in fatal cases. There is a slight bias that comes from discounting for futurity from the date of death rather than the date of the proof—remember that the gap is typically four years or so, although it can be more. It is probably fair to say that wrongful death cases take longer to process through the courts because it is harder to get the facts together as the person primarily affected by the accident is dead. From an actuarial point of view, the normal way to deal with the task in a case where the deceased had survived would be to calculate past loss and future loss separately, discounting for all the risks attendant on future loss.

For historical reasons, we have not done that in fatal accident cases but, as a matter of actuarial theory, the correct way to do it is to calculate the past loss when it is known what has happened and then calculate the future loss separately, discounting for risks and the like in the future only, because those are the only risks that apply. In a way, we are saying that you should bring the law on wrongful death into line with the ordinary law of damages. It also brings it into line with actuarial practice, which is an important criterion to go on.

The Convener: I can see that that is a logical argument. Let us now pursue the question of exemption for mental illness under section 4.

Nigel Don (North East Scotland) (SNP): Good morning. The witnesses will be well aware that section 4(3)(b) says that an award

"is not to be made in respect of mental disorder caused by A's death."

That is clearly a policy decision. May I confirm with Lord Drummond Young that such a claim could be made under common law or some other statutory provision if required, so we are not excluding it as a head of damages, merely removing it from the bill?

Lord Drummond Young: That is right. Such a claim could be made under common law. The commission produced a report on damages for psychiatric injury. It is about six years old and has not been implemented, but it would do much to rationalise the law in this area. We took the view that damages for psychiatric loss, if you can call it that, are a discrete area that we considered separately in a separate report. In some cases, the surviving spouse, partner or children might be able to recover for psychiatric losses, but that falls under distinct criteria so we did not think that it was to be properly considered in the "Report on Damages for Wrongful Death", which was concerned with the derivative rights of the family rather than the rights that the family might have for injury caused to them directly. I hope that that is clear.

Nigel Don: It is absolutely clear. "Derivative rights" is a felicitous phrase that I think I have understood correctly. I do not disagree with your argument in principle, but is it defensible in practice? Given that we are dealing with the trauma caused by the death of a breadwinner—we would not be here otherwise—and given that we are not talking about an immediate action that will happen two months after the event and that, if there is a serious mental illness, we will be aware of it by the time any serious litigation is brought, is it fair to separate out a claim for psychiatric loss when it is manifest? Should it not be dealt with at the same time?

Lord Drummond Young: In practice, such claims would probably need to be dealt with in the same action but as a distinct head of claim. The question is not really whether the claim is dealt with in the same action but whether it is dealt with in the same act. Because the issue is really a discrete head of claim, the commission thought that such matters are better left to the psychiatric injury area rather than to wrongful death. One would need to define the type of psychiatric injury that is actionable, as not every such injury is actionable. We have suggested quite a major overhaul of the law in this area, as the existing law is chaotic. It is common law that goes back to cases that were decided 100 years ago on what was described at the time as nervous shock. That is a very old-fashioned way of looking at things and needs updating.

Nigel Don: Am I entitled to draw the conclusion that the commission is suggesting that, given that the law on psychiatric loss is uncertain—I take the rebuke that we have not implemented the commission's report on the subject—a consolidation bill can consolidate everything that we have talked about previously but it cannot consolidate the law on that issue because it would need a separate bill anyway? As we are not pretending to consolidate the issue of psychiatric

loss in the bill, we are excluding the issue while recognising that the common law still applies to it.

Lord Drummond Young: Yes, psychiatric loss is one of those subjects that, as happens regularly in the law, could fall under either one topic or another. A decision just needs to be made. In this case, we took the view that psychiatric loss should be considered separately, as we did in an earlier report. We did not think that it was appropriate to deal with the issue as an aspect of wrongful death, as traditionally it has been a separate head of law.

The Convener: We now turn to the financial aspects and implications of the bill.

James Kelly (Glasgow Rutherglen) (Lab): Good morning, Lord Drummond Young. Obviously, the financial memorandum looks at costs and savings. The costs include increased settlements in relation to damages to spouses and relatives. The savings include the potential that increased efficiency of the process will reduce legal costs. Did the commission consider the potential financial implications? If so, has the financial memorandum to the bill got those aspects correct?

Lord Drummond Young: The report went through before we were obliged to provide an impact analysis. We are now obliged to provide such analyses, which can be an inexact science, I am afraid, but we use Government economists for that reason. [*Laughter*.] I have no reason to dispute the financial analysis.

The Convener: Are you saying that part of your evidence comes with no caveats?

Lord Drummond Young: I should say that I am not an economist, but there is an important point to bear in mind when looking at costs. They can be considered at two levels. First, there is the relatively modest saving in legal expenses during an action—something like £1,000 or £2,000. Secondly, there would be an increased cost on insurance companies and, through them, on employers' or motorists' insurance premiums.

However, at that latter stage, we are not creating a cost that did not already exist but allocating costs that already exist. The death causes a loss, but the question is whether that loss falls on the deceased's family or on the insurers and, through them, employers and, ultimately, the people who buy their products. It is a question of who bears the loss. We are not creating a new loss, but merely reallocating an existing one. It is important to bear that in mind when considering the law on damages.

James Kelly: It has been stated that some of the greatest beneficiaries in cash terms from the bill's introduction would be relatives of higher-earning victims. Does the commission have any view on whether that is justifiable in policy terms?

Lord Drummond Young: In policy terms, the fact that the families of higher earners receive a higher level of damages is just a necessary consequence of the fact that damages are compensatory. We could use a tariff system, but that is not how we do it and it is not how we have ever done it in this area. The damages compensate people for their loss. Inevitably, the family of a higher earner will suffer a greater loss than the family of a lower earner.

The changes that we suggest will probably have the biggest impact on families in which both partners work, which will include relatively poorer families as well as the wealthier ones. It is probably fair to say that fatal accidents in the workplace tend to occur among people who are not among the higher earners, just because of the nature of the work that they do.

Robert Brown: I have a question that is slightly off to one side. Section 13 amends the Administration of Justice Act 1982 with regard to services. We have received evidence from Tom Marshall, solicitor advocate, who has suggested that, despite what the Law Commission suggests, section 9 of the 1982 act does allow a claim for the lost period, which is the period between the victim's date of death and the day on which the victim would have died had the injury not taken place. He suggests that section 9 of the 1982 act allows such a claim by passing the claim from the victim to relatives. Can you comment on that? I have perhaps not phrased that as well as I might.

Lord Drummond Young: I am not sure that I can comment. We have set our views on what we think that the law does, which we reached after due consideration, and Mr Marshall has clearly formed a different view. I am not sure that I can usefully comment on the distinction; it is a question of what you make of the existing legislation which, almost everyone agrees, is chaotic.

Robert Brown: Surely it does no harm to clarify it.

Lord Drummond Young: Yes.

The Convener: That is the end of the committee's questioning on this section. I ask Bill Butler whether he has any issues to raise with the panel.

Bill Butler (Glasgow Anniesland) (Lab): I am content, convener.

The Convener: Does Ms Dunlop have anything to add?

Laura Dunlop: No, thank you. I do not think that I can add to what has been said by Lord Drummond Young.

The Convener: Lord Drummond Young, the committee is obliged to you and Ms Dunlop for your evidence. We note what you have said about your willingness to give evidence on these occasions, which is highly appreciated. You and Lord Tyre raised with me some time ago—and you managed to introduce it into your evidence today—the fact that a number of Law Commission reports have not been acted on. The volume of work that has come the committee's way during the current Parliament has been significant, and it is a matter of regret that we have not been able to examine some of those excellent pieces of work in more detail. I am sure that the Scottish Government is cognisant of what is in them and that some action will be taken when time and circumstances allow. Thank you very much for your attendance this morning.

Lord Drummond Young: Thank you for listening to what we had to say. I am conscious that this is an exceptionally busy committee but I hope that, in the future, some of our other reports will be acted on. I mentioned the report on psychiatric injury, and that might be a good one to start with.

The Convener: Thank you. There will be a brief suspension.

11:13

Meeting suspended.

11:17

On resuming—

The Convener: We move to the second witness panel, which comprises Robert Milligan QC—in splendid isolation—who represents the Faculty of Advocates. We are obliged to him for his attendance this morning. I intend to move straight to questioning, which I will open.

In its response to Mr Butler's consultation, the Faculty of Advocates supported a 25 per cent fixed figure. You have now varied your approach slightly and support the 25 per cent figure as a rebuttable presumption. What has caused that change of mind?

Robert Milligan QC (Faculty of Advocates): The recognition that there will be the exceptional case in which it might produce a result that does not look quite right. I suppose, like all lawyers, we like to have a certain amount of wriggle room to deal with such situations.

The test for a rebuttable presumption would be one of exceptional circumstances rather than just special cause, so we do not expect it to be used regularly. I listened with interest to Lord Drummond Young's policy arguments against that, and the arguments are finely balanced, but there is a difficulty in trying to have certainty while also having the ability to recognise a difficult case when it arises.

The Convener: Your view contradicts that of the Law Society of Scotland, which told the committee in its oral evidence last week that having the figure as a rebuttable presumption loses the simplicity of what is proposed and, given the increased distress and time elements involved, leaves the whole system open to litigation.

Robert Milligan: I read Mr Garrett's evidence on that with interest. I would always be slow to disagree with him as he is an extremely able and experienced practitioner in the area. That is why our view is that, if there was a rebuttable presumption, it would apply only in exceptional circumstances.

The Convener: I hear what you say but, while one does not wish to be overly prescriptive on the matter, it seems to me that we either have it or we do not. If we have the escape hatch or wriggle room, as you define it—the rebuttable presumption—there is bound to be an element of litigation that in other circumstances could be avoided.

Robert Milligan: I cannot disagree with that.

Nigel Don: Convener, can I come in on this? I have no concept that we have ever done this in law, but if we said that the 25 per cent is a rebuttable presumption, could we phrase it in such a way that it applied unless there was clear evidence that it was at least 5 per cent out—in other words, that it should be 20 per cent or less, or 30 per cent or more? Is that a credible and tenable way of writing law? I recognise, as I am sure we all do, that there might be the odd case in which it would be very wrong, perhaps for reasons that we cannot conceive of at present. If there were some numerical boundaries against which there had to be some evidence, would that make sense?

Robert Milligan: I do not see why that would not be possible. Lord Drummond Young mentioned a decision of Lord Glennie's. I think that he was talking about the case of Weir v Robertson. I have a copy of that, which I will be happy to pass on if it is of interest. He adverted to the situation in England, where it seems that the rule is 25 per cent if there are no dependants and a third if there are dependants, so it is clear that parameters could be applied.

Dave Thompson: Good morning, Mr Milligan. In his evidence, Lord Drummond Young said that he thought that having a rebuttable presumption

would make things worse, in the sense that the individual's own solicitor would not sit down with them early on to determine the sum. That would be done later on, and it would be much more controversial. Do you agree?

Robert Milligan: I listened to his evidence with interest and I see the strength of that argument. I can only return to the hope that it would be used only in exceptional circumstances where there would clearly be an injustice if the 25 per cent rule was applied.

Dave Thompson: You cannot be sure that it would be used only in exceptional cases, of course. In practice, it might be much—

Robert Milligan: The wording would need to state specifically that the rule is to be applied unless exceptional circumstances apply and applying it would give rise to a clear injustice. I do not want to attempt to draft the wording on the hoof, but I do not see that it would be impossible to make it clear that the legislative intent was that the 25 per cent rule was to be diverted from only in very unusual circumstances.

Dave Thompson: Of course, it might well be better to leave things as they are.

Robert Milligan: That is entirely a matter for you, of course.

Robert Brown: I want to explore that a bit further. Would the solicitor who was preparing the case not have to explore the issue anyway, whether it was exceptional or not, in the pursuit of proper professional practice? Would they not have to go through all the business of getting the receipts and finding out a bit more if they were not to be subject to some criticism in the first place?

Robert Milligan: We would have to look at the matter in context. Certainly, if we were talking about a litigated claim, the defenders would have had to raise it, somehow, in their pleadings. There would have had to be a reason for them to say, "Hold on. This is not a standard situation." For example, the claim could involve a particularly high earner.

Robert Brown: It could happen either way, presumably. If it is a rebuttable presumption, it could be rebuttable by the pursuer or the defender.

Robert Milligan: Indeed, yes.

Robert Brown: My question is, if we had a rebuttable presumption, would that not mean in practice that the solicitor had to explore all of this in his preparation for the case if he was not to be subject to some criticism?

Robert Milligan: Yes. I suppose that, in that sense, at least some preliminary inquiry would be needed to see whether there was a particular reason why the case was exceptional.

The Convener: Changing the theme slightly, we will move on to deal with those with the right to seek a remedy.

Stewart Maxwell: This morning, we heard Lord Drummond Young accepting that careful drafting could deal with the possible danger of including people who could claim for business loss, as opposed to domestic loss, which is different from the Scottish Law Commission's original view. What is the view of the Faculty of Advocates?

Robert Milligan: We do not agree with the Law Commission on this matter. It seems to us that if, as a matter of fact, someone outwith the range of relatives that is defined in the act is receiving support, that should be recognised. It should be understood that we are dealing with the apportionment of an overall award; the fact that someone else is entitled to a share of that should not affect the overall award. It is fair to say that the situation does not arise regularly, but it seems unfair to exclude it simply in the interests of simplifying the law.

Stewart Maxwell: What is your position on the specific issue of business relationships? Do you agree with the Law Commission's original view or the view that I think was expressed this morning?

Robert Milligan: We agree that the business side of things should be excluded, but I do not see that that could not be dealt with by careful drafting.

Stewart Maxwell: Is the bill drafted carefully enough in that regard at the moment, or does it require further work?

Robert Milligan: I am not sure that I would be comfortable about giving an immediate answer to that.

Stewart Maxwell: Perhaps you could come back to us on that.

The Convener: It would be helpful to have a note on that subject.

Robert Milligan: Okay.

Robert Brown: I want to pursue the question of the restriction on the class of relatives. You heard Lord Drummond Young talking about former spouses and civil partners, the clean-break policy and a more restricted definition of relatives in section 14. I would be grateful if you could give us a feel for the sort of situations that might not be terribly satisfactorily covered by eliminating former spouses and civil partners from the category of relatives who are able to sue.

Robert Milligan: It would not be unique for a situation to obtain in which some support was still provided, notwithstanding the overall policy of

family law these days. Further, other family members might be receiving support—perhaps short-term support as they go through university or support for one specific event. As I said, if such support exists, we do not see the justification for excluding it.

Robert Brown: There might be, for example, a nephew or a niece who was being supported through university by a relatively wealthy uncle.

Robert Milligan: With no children of his own.

Robert Brown: Yes. What about the definition of children who are accepted into the family? I have posited the idea of certain foster children or other children in a slightly more anomalous situation. Could issues arise around such arrangements?

Robert Milligan: Yes. Another question is whether the definition of a child is restricted to a person who is under 16, or whether someone over that age could be viewed as a child. The definition is not entirely clear to me.

Robert Brown: The Law Society has also suggested that the current class of people who can make a claim should be expanded to include anyone, whether a relative or not, who has received financial support. Does the Faculty of Advocates support that, or is there a danger that bad law could be created?

Robert Milligan: That becomes much more difficult, simply as a question of proof, to be honest. At least with a relative, there is a clearly defined boundary. Once you can have people coming up and saying, "He was my friend and he always bought a round on a Friday night," where do you draw the line?

Robert Brown: Do you see any downside to continuing with the wider, unrestricted definition of relatives in the current law?

11:30

Robert Milligan: In my experience—and the experience of others at the bar to whom I have spoken—it is simply not an area that has caused any difficulty.

Robert Brown: Thanks very much.

The Convener: We will now go on to questions on the application of the 75 per cent figure.

Cathie Craigie: Good morning, Mr Milligan. In relation to relatives' claims, section 7 provides that the courts are required to assume that 75 per cent of a victim's income was used to support the relatives. In giving evidence to the committee last week, Graeme Garrett of the Law Society of Scotland told us:

"The 75 per cent rule is a necessary corollary of taking a 25 per cent reduction so, if we accept one, we have to accept the other, otherwise we would be left with a gap."—[*Official Report, Justice Committee*, 7 September 2010; c 3425.]

Do you accept that?

Robert Milligan: Yes.

Cathie Craigie: That was a good, clear answer. Thank you very much.

In the Faculty of Advocate's response to Mr Butler's consultation, you supported the 75 per cent figure as a fixed rule. Now you support it as a rebuttable presumption that is capable of being set aside. Will you explain to the committee what motivated that change of view?

Robert Milligan: I suppose that it is the usual story: if you ask groups of advocates the same question, they will give you slightly different answers. It is simply the case that a slightly differently composed committee dealt with the question second time round.

Cathie Craigie: We have had experience of that as well. Do you want to add anything to that or to explain what the thinking might have been in the differently composed committee?

Robert Milligan: I was not involved in the two earlier committees, so I cannot speak for what was decided then. I think that there have been three responses from the faculty in total, going back to 2007. The question is recognised as being a difficult one. There is a balance to be struck. Some members of the bar will support a harder line and some will support the status quo. I do not think that I can really go beyond that.

Cathie Craigie: Can you not say anything more about the view that the 75 per cent figure should be a rebuttable presumption that could be set aside in exceptional circumstances? Can you give the committee any examples of what those exceptional circumstances might be?

Robert Milligan: If the deceased had a very expensive hobby, such as flying their own plane, that could have accounted for a substantial proportion of their money—depending on their overall income. That could be an exceptional circumstance in which someone spent a lot of money on themselves rather than contributing to the household pot, as it were.

Cathie Craigie: In the response to Bill Butler's consultation, the faculty supported disregarding the income of the spouse or relative making the claim. Now, you favour disregarding only 25 per cent of the income, with that figure again being a rebuttable presumption in exceptional circumstances. Will you expand a bit on that? Why did you pick the 25 per cent figure?

Robert Milligan: It seems logical if you are considering the household pot and excluding the individual's income. You are saying that 25 per cent would have been spent on themselves, and it seems logical to apply that to either spouse, regardless of which spouse is killed. If we disregard a spouse's whole income, we are perhaps overcompensating.

Cathie Craigie: Does the faculty support having a figure at all, whether it be 25 per cent, 50 per cent or 75 per cent, or would you rather have no figure?

Robert Milligan: Logically, it should be the same figure as applies to the deceased.

Cathie Craigie: With great respect, your arguments for changing the bill do not seem very strong—you are not convincing me in any way. Do you have any further comments on the issue?

Robert Milligan: I simply say that the proposal could to a large extent efface what already happens. Whether that is an argument for or against change is a matter for the committee.

Cathie Craigie: You talk about what already happens. In your responses, are you highlighting cases that have come up in the past? Are your arguments based on experience?

Robert Milligan: Yes. Fortunately, fatal claims are a relatively small part of personal injury practice—they are the exception rather than the rule. However, there have been cases in which a higher percentage was discounted. Mr Garrett said that 25 to 30 per cent was normal, but there have been discounts of up to 40 per cent.

Cathie Craigie: That would be the exception.

Robert Milligan: Yes, and I think that that is probably in older cases.

The Convener: We proceed to the application of multipliers. In the faculty's response to the Scottish Government consultation, it supported the reform of the use of multipliers under section 7. However, the faculty did not give any reasoning behind that. Will you give us that now?

Robert Milligan: Do you mean in relation to the date of the multiplier being from date of proof or date of death?

The Convener: Well, you can deal with that, too, but you did not actually say why you support the proposed change.

Robert Milligan: The strength of the measure is the actuarial one that Lord Drummond Young explained—the purpose is to allow people to benefit from the early payment of a lump sum. If the sum is not paid early, much of the benefit is lost. In 2001, there was a case called Sargent v Secretary of State for Scotland in which it had taken so long for the case to come to proof that the multiplier had actually run out by the date of proof. There was an 11-year gap and the multiplier was less than that. Lord Clarke raised the point that that was an inequitable result, but he felt bound by authority to follow it, and the matter was taken no further. Fortunately, there has been a change in procedure since and it is now very unusual for cases to take that long to come to proof, so that is less of a practical problem than it might have been in the past. However, it is conceivable that there could be a long delay between the death and the proof, in which case there can be a clear injustice.

The Convener: There is the old saying that hard cases make bad law. An 11-year delay must surely have been absolutely exceptional.

Robert Milligan: I am pleased to say that that is certainly the case now.

Nigel Don: I return to the subject that I raised with Lord Drummond Young. I think that you heard that discussion. I derive from what he said that the issues of significant mental illness need to be consolidated in another bill. That seems to be the principal justification for specifically excluding those issues from the codification in the bill. However, I am conscious that that is not consistent with the faculty's response. Will you take it from there for me?

Robert Milligan: I suspect that Lord Drummond Young is considering the issue in the context of having a reformed law of psychiatric injury, whereas we are considering it as the law currently stands. Currently, in the majority of cases, there would not be a separate claim for psychiatric injury. Such a claim would arise only when a surviving relative witnessed the accident, which, fortunately, is relatively uncommon.

Last week, Mr Garrett suggested that, under the law as it currently stands, such a person would not be entitled to the extra claim. The faculty's position is that they would. That difference arises because of a conflict of outer house authority: two different cases apply.

In our submission, we refer in some detail to the case of Gillies v Lynch, which involves a mother who suffered a very severe abnormal grief reaction to the death of her adult child. The case was allowed to go before a jury, as a result of which a very large award was made. Another, conflicting decision suggests that compensation should not have been allowed for that abnormal grief reaction. The faculty view is that if damages in this area are going to be dealt with on a subjective basis—in other words, if we do not have a tariff but say that people should be compensated for the loss that they have suffered—an arbitrary cap should not be applied if, as a matter of a fact,

someone has suffered a very severe grief reaction. As Lord Drummond Young indicated, the law on psychiatric injury as it stands imposes arbitrary caps all over the place. That is why the difference of opinion arises.

Nigel Don: That answer has raised a point of which I was unaware. I had not realised that caps apply under other processes. Are you suggesting that the opportunity has been missed in the bill to remove the caps?

Robert Milligan: If you are looking at the law as it currently stands, our view is that there should be no arbitrary cap. If the law on psychiatric injury applied more generally and was amended to allow separate claims to be made, the problem would not arise. The problem at the moment is that, nine times out of 10, no separate claim is made for psychiatric injury.

Nigel Don: Right.

Robert Milligan: If a relative of yours died and that caused you psychiatric injury, it does not automatically follow that you have a claim.

Nigel Don: So, if we leave section 4(3)(b) as it stands, we will have missed an opportunity to rectify the law.

Robert Milligan: In the faculty's view, the answer is yes. That view is a consistent feature of the responses thus far.

Nigel Don: We will need to explore the matter further at a later stage. The questioning has taken me down a new avenue.

The Convener: Yes. There is a difficulty, which we will have to resolve at some stage.

Cathie Craigie: The Scottish Law Commission view is that a bill is required solely for that area. Can something be done in the bill that is before us or is the commission right in saying that such a large piece of work needs to be done in its own right and not tagged on to another bill?

Robert Milligan: As I said, the difficulty for practitioners at the moment is that two conflicting cases apply. It is difficult to advise a client which is the correct law. I am trying to remember the section that specifically excludes—

Nigel Don: Section 4(3)(b).

Robert Milligan: Yes. Whether that becomes a positive rather than a negative is really a policy decision.

Nigel Don: I am not sure that we will resolve the matter today, but I want to ensure that I have got to the nub of the matter. By sticking with the law as drafted, surely we are forcing clients into a common-law action with a separate head of damage. You say that you are not in a position to advise clients professionally, other than arbitrarily, which outer house case stands up. Removing the provision in section 4(3)(b) would allow such a claim to be made in default under this statute. Have I got that right?

Robert Milligan: If the bill remains silent on that point, the same difficulty will apply as applies at the moment. The bill at least makes it clear that the arbitrary cap will apply. However, our position is that there should not be an arbitrary cap, and that it would be better if section 4(3)(b) said that the award did cover any mental disorder.

11:45

Nigel Don: So with that short phrase, we as a Parliament would be deciding which of those outer house cases we prefer.

Robert Milligan: Yes.

Nigel Don: As I am sure you will recognise, we as a Parliament might be slightly staggered to be doing that with a single phrase, without any further consultation. We are unlikely to want to do that—we would not be wise to do that.

Robert Milligan: That is what you are doing at the moment, as things stand. You are indeed making that decision.

Nigel Don: This goes back to my point, convener—this is an issue that we need to pursue at slightly greater length.

The Convener: There appears to be a lacuna that will have to be filled at some stage.

Robert Milligan: When looking at some of the previous evidence, I was surprised that the matter had not been addressed more directly. It is an important point.

The Convener: You are doing us a note on another matter, so could you give us the case references for the two contrary judgments?

Robert Milligan: Yes. One is Gillies v Lynch, which is referred to, with a citation, in the Faculty of Advocates' response dated 19 October 2009. The matter is dealt with in some detail, at paragraph 5. The conflicting authority is a case called Ross v Pryde. That is a decision of Temporary Judge Macdonald, now Lord Uist. That was around 2004, but I am afraid that I do not have the precise reference to hand.

The Convener: That is fine, Mr Milligan—we will get the information at a later stage. Clearly, there is a difficulty that will have to be reconciled. In the meantime we will explore the financial implications, with James Kelly.

James Kelly: I will raise the point that I made at the previous evidence session. The financial memorandum deals with costs relating to

settlements for damages that will be paid to spouses, relatives and others. There are also savings to be derived from a potentially more efficient process, possibly with reduced legal fees. What is your view on the financial memorandum and its implications?

Robert Milligan: You should appreciate that advocates are spectacularly ill-advised on matters of that sort, and even less well positioned than Lord Drummond Young is to comment on that aspect of the matter. I imagine that the finances of the proposed measures are broadly neutral. I would be surprised if there were major cost implications one way or the other from the reforms, especially given that—as I have already indicated—they largely consolidate the position as it already obtains, rather than radically changing it.

The Convener: Before we move on, we note that Bill Butler, who is the member in charge of the bill, is also a member of the committee. I stated at the start that, although he is here with us today, he is basically ex parte for these proceedings. Mr Butler, do you have any questions for Mr Milligan?

Bill Butler: No, but I wish to thank Mr Milligan for the interesting points that he has raised in the course of giving evidence. That is all that I will say for the moment.

The Convener: Mr Milligan, I, in turn, thank you for your attendance this morning, and for the candour which you showed in some of your answers. You have possibly left us with a difficulty, but that is a matter for us to resolve. Your evidence this morning has been exceptionally useful, and we are grateful to you for coming.

11:49

Meeting continued in private until 12:20.

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